

DECISION



094788
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

Protest of Air Force Contract Award 409602

FILE: B-178542

DATE: July 19, 1974

**MATTER OF: Continental Cablevision of New Hampshire,
Inc., and Satellite Systems Corporation**

- DIGEST:**
1. Offer to provide microwave services for CATV franchise at indefinite time in future at undetermined cost cannot be considered since evaluation factors may not be subject to speculation whether they will occur and must be quantifiable.
 2. Allegation that improper negotiations were conducted which resulted in technical trans- fusion of concept of use of microwave in CATV system does not serve as basis to question award of CATV franchise because information could not be considered in evaluation from a cost standpoint in RFP and AFR 70-3, which governs the award of CATV franchise by the Air Force.
 3. Return of unsigned and undated amendments to offeror prior to closing date for receipt of best and final offer for signing and dating is viewed as procedural short- coming which did not affect substance of procurement since both amendments were returned signed and dated prior to closing date for receipt of best and final offers.
 4. Where both offers received in response to RFP are rated acceptable by technical evaluation team and solicitation stated that price was of prime importance, award to low offeror is proper notwithstanding allega- tion by other offeror that it offered superior services since determination whether material differences in technical aspects justifies award to higher price proposal is within discretion of contracting officer and there is no showing that decision was not reasonably reached.

5. Determination of responsibility of prospective contractors is primarily for resolution by contracting agency and since there has been no showing of abuse of discretion, GAO will not object to such determination.

On September 15, 1972, the Air Force issued request for proposals (RFP) No. F27604-73-R-0008 for the installation and service of a cable TV (CATV) system at Pease Air Force Base, New Hampshire, for a ten-year period. The solicitation requirements and clauses conformed to Air Force Regulation (AFR) 70-3, which governs the award of CATV franchises by the Air Force. 162

Amendment M12 was incorporated in the RFP and stated the evaluation for award formula:

"Award shall, as a general rule, be made to that responsible, responsive offeror submitting an offer which would result in the lowest annual price. In the event two or more proposals result in equal price, award will normally be made to the one with the shortest term. (See 'Instructions for Schedule A', paragraph 'd' for further explanation of evaluation of proposals for award.) Award may be made to other than the lowest offeror for the shortest contract period if justified by material difference in the configurations of the proposed systems, the quality of the equipment offered, the nature of supplementary service offered above and beyond specific minimums, repair capabilities, or the demands that will be made with regard to government-furnished property."

In response to the RFP, two proposals were received: Continental Cablevision of New Hampshire, Inc. (Continental), and Satellite Systems Corporation (Satellite).

Both Continental and Satellite were determined to be in the competitive range. Initial negotiations were conducted with Continental on December 4, 1972, and with Satellite on December 5, 1972. Best and final offers were required by January 12, 1973. On January 11, Continental met with the contracting officer and presented its final proposal. This included the use of microwaves whenever they became available. No firm price was submitted. Later the same day, the contracting officer contacted Satellite for further discussions in part

to determine whether it could supply microwave service when it became available. On January 12, 1973, Satellite submitted its best and final offer for the estimated annual price. Satellite's proposal was \$44,475.00, while Continental's price was \$45,400. In accordance with AFR 70-3, both proposals were submitted to the Base Communications Officer for his determination of technical sufficiency. On January 25, 1973, the communications officer found both proposals acceptable. Consequently, the contracting officer determined to award the franchise to Satellite on January 31, 1973, and award was made on March 26, 1973.

Continental protests on the following grounds:

1. The contracting officer improperly made award almost solely on the basis of price because he failed to properly evaluate the use of microwave, subscriber potential and tower height and location;
2. The contracting officer improperly transferred information to Satellite concerning Continental's intended use of microwave signals during negotiations;
3. The contracting officer improperly requested Continental to backdate an amendment to the solicitation; and
4. Satellite is not a responsible offeror.

The first basis of Continental's protest is the manner in which the proposals were evaluated. The evaluation is controlled by the paragraph of the RFP quoted above and the provisions of AFR 70-3. In another recent protest that the evaluation of offers for CATV franchises did not accord sufficient weight to factors other than price, GAO stated:

"The AFR and RFP establish the lowest cost as the primary evaluation factor. However, award may be made to other than the lowest cost proposer, under this evaluation scheme, if another offeror proposes technical aspects, itemized in the award evaluation provision, which are materially better than those proposed by the low offeror. Necessarily, the determination whether the technical aspects offered justifies award to other than the low offeror

is judgmental in nature and is entrusted to the discretion of the contracting officer." 53 Comp. Gen. _____ (B-178684, March 21, 1974).

The offer for microwave services evidenced Continental's intention to use it when it became commercially available. Existing facilities did not permit microwave utilization until some indefinite time in the future. In this vein, evaluation of proposals to determine the most advantageous offer to the Government should be confined to matters that are not subject to speculation whether they will occur or not and should be quantifiable. Cf. 53 Comp. Gen. _____ (B-178684, supra); B-173915, December 21, 1971; 43 Comp. Gen. 60 (1963). Since prices were not required, or submitted, for microwave services, they could not form a part of the cost evaluation. Also, since Continental could not definitely state when microwave services would be available, they could not qualify for consideration under the evaluation scheme as a " * * * supplementary service offered above and beyond specific minimums * * *" so as to justify award to other than the lowest cost proposal.

We also believe the same rationale is applicable to Continental's allegation that its commercial subscriber base in the Pease AFB area presented a greater possibility for economic use of microwaves than Satellite's offer utilizing only on-base subscribers. It is apparent that microwave services could not play a role in the evaluation for award process. Therefore, the manner in which the contracting officer conducted negotiations concerning microwaves cannot serve as a basis to question the legality of the award. In any event it appears that the contracting officer could require any contractor to provide microwave services when they become available under paragraph 24 of the RFP, entitled New Developments.

Continental suggests that its 300-foot antenna tower located off base will give better reception than the 150-foot tower proposed by Satellite on base. Continental contends that the on-base site is less preferable due to interference from the landing aircraft. Both tower plans were voted acceptable by the technical evaluation team. AFR 70-3 contemplates award to other than the low bidder for "material differences in the configurations of the proposed systems." Both towers were determined to be able to provide acceptable reception. The decision, whether there are material differences and whether it justifies award to other than the low offer is within the discretion of the contracting officer. 53 Comp. Gen. _____ (B-178684, supra). GAO will not substitute our opinion for that

of the contracting officer unless it is shown to have been reached unreasonably. There being no such showing, the contracting officer's decision must stand.

Continental also contends that it should have been given a further opportunity to negotiate after the January 11th and 12th communications with Satellite concerning its best and final offer. Section 3-805,1(b) of the Armed Services Procurement Regulation (ASPR) provides that "Whenever negotiations are conducted with several offerors while such negotiations may be conducted successively, all offerors * * * shall be offered an equitable opportunity to submit such * * * revisions in their proposals as may result from the negotiations. All such offerors shall be informed by the specified date of the closing of negotiations and that any revisions to their proposals must be submitted by that date. * * *" Eventually negotiation must end so that proposals and prices may be evaluated by the Government. B-164253, July 24, 1968. From our review of the record, our Office has no objection to the manner in which negotiations were closed in the instant procurement.

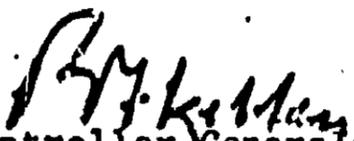
Regarding Continental's contention about the alleged improper request to sign and backdate amendment M01, the record shows that amendment M01 was issued on October 12, 1972, and extended the time for receipt of proposals indefinitely. When it was discovered in December 1972 that Continental had returned its copy of amendment M01 unsigned and undated, a second set was sent. These were subsequently returned signed and dated January 2, 1973. Thereafter, another copy of amendment M01 was received by Continental accompanied by a note requesting that the amendment be returned, signed and dated any time prior to October 30, 1972, the date of amendment M02, which established, in part, a new closing date. The contracting officer states that the sending of the second amendment M01 was a mistake. Whatever the motive, we regard these events as procedural shortcomings which did not affect the substance of the procurement. In any event, the amendment irregularities were cleared up prior to receipt of best and final offers by the later amendment which rendered the first amendment meaningless.

Lastly, Continental disputes the determination of responsibility of Satellite. It is Continental's position that it is a matter of speculation because no procurement officials visited Sawyer Air Force Base, Satellite's only operations installation, during the preaward survey, to ascertain how well the system was functioning. However, the preaward survey performed on Satellite, which was furnished to GAO by the Air Force,

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included observation of the Sawyer AFB installation in operation. The Air Force determined Satellite to be a responsible contractor in accordance with the applicable provisions of ASPR. The determination of a proposed contractor's responsibility is largely within the discretion of the contracting officer. The contracting activity must handle the day-to-day administration of the contract and bear the brunt of any difficulties experienced by reason of the contractor's lack of ability. If, pursuant to the applicable regulations the contracting officer finds the proposed contractor responsible, we do not believe the finding should be disturbed except on the basis of fraud. Since no fraud has been alleged or demonstrated, we must decline to further consider the matter. B-181076, June 6, 1974.

For the foregoing reasons, the protest is denied.


Deputy Comptroller General
of the United States